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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 721

JEWELL RIDGE COAL CORPORATION, a Corporation, *Petitioner*,

v.

LOCAL No. 6167, UNITED MINE WORKERS OF AMERICA etc., et al., *Respondents*.

PETITION FOR REHEARING

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PETITION FOR REHEARING

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Jewell Ridge Coal Corporation, respectfully prays that the Court will rehear the judgment entered by it herein on the 7th day of May, 1945, affirming a judgment entered herein by the Circuit Court of Appeals for the Fourth Circuit on the 6th day of October, 1944, and that upon such rehearing it will reverse said judgment of the Circuit Court of Appeals for the Fourth Circuit.

All italics are petitioner's unless otherwise noted.

For brevity, the Fair Labor Standards Act of 1938, 52 Statutes at Large 1060-9, 29 U.S. C.A. 201-219, will be called the Act; the Administrator of the Wage and Hour Division of the United States Department of Labor will be called the Ad-

ministrator; International Union, United Mine Workers of America, will be called the Union; and the case of **Tennessee Coal, Iron & Railroad Co. v Muscoda Local No. 123, etc.**, will be called the Tennessee Case.

The grounds of this petition are as follows:

I. There is a Question as to the Qualification of His Honor Mr. Justice Black to Take Part in the Consideration and Decision of the Cause.

His Honor Mr. Justice Black took part in the consideration and decision of this cause. It appears to us that a question may exist whether he was so situated as to be in position to administer impartial justice in this the Court of ultimate resort, by reason of his connection with (1) the subject matter of the cause and (2) the chief counsel for the respondents.

1. The purpose of this action is to interpret, as applicable to the bituminous coal mining industry, certain terms of the Fair Labor Standards Act of 1938, 52 Stat. 1060-9, 29 U.S.C.A. 201-9, which are not expressly defined in the act. To that end the Court found it necessary to resort, *inter alia*, as shown by the text of the opinions, to the legislative history of the Act. Mr. Justice Black's connection therewith is as follows:

(a) On May 24, 1937, Mr. Justice Black, then a member of the United States Senate, introduced a bill (S. 2474) to provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes. This bill was referred to the Senate Committee on Education and Labor, of which Mr. Justice Black was chairman. On July 6, 1937, he, for the committee, submitted a report (Report No. 884) to accompany S. 2474, which report dealt with the public hearings held by the committee jointly with the House Committee on Labor, discussed the testimony presented,

proposed certain modifications, and reported favorably an amended bill in the nature of a substitute. The record of the proceedings indicates that Mr. Justice Black was the most active and prominent sponsor of the bill in the senate, both in committee and on the floor, until his appointment to this Court. He made statements pertinent to the issue here presented, which were reported in the Congressional Record, and which this Court found it necessary to interpret in deciding the cause—"Such general remarks, when read fairly and in the light of their true context, were obviously not made with this narrow issue in mind * * *" (pp. 5-6 and footnote). *He participated in this Court's consideration and interpretation of his statements.*

(b) There is a question whether one so intimately situated in relation to the origin and development of the legislation, and of necessity influenced by many personal recollections, impressions, and predilections *dehors* the record, is in position to judge with appropriate detachment the recorded history, in which he himself was one of the actors. That alone is available to the parties for briefing and argument and to the other members of the Court for consideration.

2. His connection with Crampton Harris, Esq., chief counsel for the respondents has been as follows:

(a) He was for a number of years associated with Mr. Harris as partner in the practice of law at Birmingham, Alabama, under the firm name of Black and Harris. The partership terminated in 1927 when Mr. Justice Black took his seat in the United States Senate.

(b) In 1935 Mr. Justice Black was appointed chairman of the Special Committee of the United States Senate to investigate Lobbying Activities. Mr. Harris was appointed committee counsel.

(c) Mr. Justice Black, as chairman of the above-mentioned special committee, was one of the defendants in an injunction suit instituted in the District Court of the United States for the District of Columbia under the style of **Hearst vs. Black.** The plaintiff, upon an adverse result in the District Court, carried the case to the United States Court of Appeals for the District of Columbia, where it was decided November 9, 1936 (**Hearst vs. Black**, 87 F. 2d 68). Mr. Harris was sole counsel appearing for the defendants.

3. Petitioner suggests that if Mr. Justice Black's position of impartiality was, or may reasonably have been, impaired in consequence of the above stated facts, a rehearing of the cause is the proper remedy.

II. The Court, in Stating Certain of the Facts of Underground Travel, Overlooked Portions of the Record Establishing the Contrary.

The Court, on pages 2-4 of the opinion, states the facts of underground travel upon which it relied in reaching its decision. But it overlooked portions of the record which clearly establish the contrary in certain important instances.

1. The Hazards Incident to Travel on the Mantrips Are Not Due to Rockfalls.

The opinion shows that the Court was strongly impressed with the idea that the mantrips are operated under a roof from which rocks continually fall to the grave peril of those passing beneath. The Court said:

> "The dangers of falling slate and falling ceilings are **ever present** (p. 2) . . . The record shows that six persons suffered compensable injuries, involving absence from work for seven days or more while riding on petitioner's mantrips from January 1, 1939, to October 31, 1943.

> There is also evidence of **two deaths** and numerous minor injuries to the miners (pp. 2-3) . . . . . From the moment they enter the portal until they leave, they are subjected to **constant** hazards and dangers; they are left **begrimed and exhausted** by their **continuous** physical and mental exertion" (p. 4).

The Court assumes that the presence of hazard in travel is a badge of work on the part of the traveler. Adopting that assumption, we are sure that we can demonstrate beyond question that the Court's impression that the mantrips are in constant peril from rockfalls is erroneous. The Court became confused between the conditions on the "main line" or "main haulage ways," where the mantrips are operated, and those in the other portions of the mines where the work of extracting coal is actively proceeding. In the latter areas there is danger from rockfalls as an incident to the active mining, but the mantrips are not operated in such areas. On the "main haulage ways" mining operations have been long since concluded, while the continuous flow of traffic makes these ways subject to the constant inspection of all the employees, in addition to the daily official inspections (R. 509). We feel safe in asserting on the basis of the record evidence that the traveler along a "main haulage way" is as safe from a rockfall as he would be in a railway tunnel or in any cavern to which the public resort without a thought of danger from the roof. It is true that employees riding the mantrips occasionally (though very rarely) suffer injuries. But these injuries do not result from rockfalls. They are incident to the fact that the employees are riding in moving vehicles, and are such as would equally occur if only the sky were overhead.

The confusion in which the Court fell upon this point was due to the continual effort of the respondents, in presenting their evidence and their arguments, to play up the general

hazards of coal mining, without restricting themselves to the hazards of travel on the "main line." Witness, in addition to their testimony and exhibits on this subject, Appendices 2, 3 and 4 to their brief (pp. 22-4), stating the number of "Coal Mine Accidents in the United States" in certain periods.

These "main line" haulways "are the most safest haulage that we have" (R. 509-510); "they would be the most safe, they are the most safest" (R. 520). A striking corroboration of this general testimony is found in the evidence as to specific instances. **The record fails to establish that a single injury to employees riding a mantrip has ever occurred in petitioner's mines in consequence of a rockfall.** A tabulation was made of all compensable injuries, six in number, occurring between January 1, 1939, and October 31, 1943, a period of nearly five years (Ex. 45, R. 527, 807-9). It showed that all the injuries were due to wrecks or other like misadventures relative to the operation of wheeled vehicles. This testimony, and other items to the same effect, was accepted by the District Court, and his findings thereon are final under Rule 52.

It is true that the respondents, in addition to confusing the general hazards of coal mining with those of the mantrips, introduced evidence of two fatal accidents (R. 384) which were claimed by hearsay to have occurred on a mantrip (R. 390), but the company's records showed that these two fatalities did not occur on a mantrip and were due, not to a rockfall, but to a head-on collision (R. 526). The Court was doubtless led to its mention of "two deaths" (p. 3) as having occurred on mantrips by the statement to that effect in the brief for respondents (Br. p. 9). But it is clear that on the conflict of testimony, the District Court's findings are conclusive.

This Court stressed the hazard of falling rocks as distinguishing travel by mantrip from surface travel, and as

lending to the former the character of work. Is it not too plain for argument that the Court was misled as to this feature? Is it not equally plain that such hazards as apply to the mantrips apply essentially to all wheeled traffic, and have little or no causal relationship to the fact that these vehicles run beneath the surface?

As for the considerable number of employees who enter the mines on foot without resort to the mantrips, it is most significant, and fully corroborative of what has just been said, that the record fails to disclose a single injury to have been sustained by these pedestrians. Obviously if "the dangers of falling slate and falling ceilings are ever present" as the Court supposed, some of these employees must have suffered injury thereby.

2. There is No Essential Difference, so Far as Mental and Physical Exertion are Concerned, between the Highway Travel and the Travel by Mantrip.

In stating the facts distinguishing the employee travel between home and portal from that between portal and working place, the Court continued to confuse the incidents of travel on the mantrips with those of active mining operations in the working places. The Court said (p. 4):

> "Those who are forced to travel in underground mines in order to earn their livelihood are unlike the ordinary traveler or the ordinary workman on his way to work. They must journey beneath the crust of the earth, far removed from the fresh and open air and from the beneficial rays of the sun. A heavy toll is exacted from those whose lot it is to ride and walk and mine beneath the surface. From the moment they enter the portal until they leave, they are subjected to constant hazards and dangers; they are left begrimed and exhausted by their continuous physical and mental exertion."

About two-thirds (R. 243, 245) of petitioner's employees travel from their homes to the mines by highway over mountain roads in motor vehicles over distances ranging up to thirty-six miles each way (Ex. 28, R. 244, 707). It is a matter of common knowledge that such travel is attended by definite hazard and is accompanied by occasional injuries to the travelers, some of which are serious, in fact much more serious than any which attended the travel by mantrip in petitioner's mines. It is also attended by definite hardships due to the weather, the state of the highway, and the character of the vehicle. The District Court comparing the two modes of travel justifiably stated that if petitioner's employees ought to be paid for the travel by mantrip, it might

> "also be contended that they are entitled to pay for the time spent in travel from the points where they board the trucks and buses to the mines" (53 F. Supp. 949, app. pet. 75).

There is, of course, some difference between the travel of the employees by highway and the travel by mantrip, but the difference is not fundamental. The travel is "the same sort of thing." In each case, the means are wheeled vehicles, and the purpose is to enable the employee to report for his work at the place and hour fixed therefor.

This Court in stating that the mantrip travel is "far removed from the fresh and open air," overlooked the uncontradicted testimony that the air on the "main line" is always fresh and agreeable, supplied by numerous power fans, some of which are of very great size, delivering "around 15,000 feet of air a minute" (R. 92), and providing a greater circulation than the law requires (R. 93). It is true that there was some complaint of odors in some of the working places, but respondent's witness admitted that no such complaint was applicable to the mantrips (R. 438). The Court's impression that the air on the mantrips

is not "fresh" is another instance of confusing conditions on the mantrips with conditions in the working places.

In speaking of the plight of "those whose lot it is to ride and walk and mine beneath the surface," the Court is very obviously confusing the time spent in travel and the time spent in mining operations. The latter item is not an issue in this cause. That the active work of mining coal in the working places subjects the workers to "hazards and dangers" and leaves them "begrimed and exhausted" may be conceded. It may be that the work involves "physical and mental exertion" which might perhaps be described as "continuous", and that it exacts "a heavy toll". But the record does not in any wise justify the application of these terms to travel on the mantrips. The only "physical and mental exertion" which is suggested is keeping the head down sufficiently low to insure it against striking low places in the roof. Since the employees must soon learn by experience how low that is, there is certainly no physical or mental exertion involved in assuming and maintaining that attitude. The employees have no duties to perform and no outlook to keep. There is obviously nothing about maintaining their position in the car which is calculated to "exert a heavy toll" or to "exhaust" them. No witness claimed that the ride was 'exhausting', and on the contrary there was positive evidence that riding a mantrip is not more laborious than "sitting in that chair" (R. 164). The findings of the District Court are fully supported by the evidence on this feature. The record does not even support the idea that the employees become "begrimed" on the mantrip. The testimony is clear and uncontradicted that "there is never any dust that amounts to anything collects back there" (R. 94) on the "main line". Is it not plain that the Court received a mistaken impression from the confusion fostered by the respondents in this phase of the case?

Does it not then follow that the Court's impression of fundamental differences between the automobile travel and the mantrip travel is a mistaken one? The miner who is driving his automobile to work is certainly subjected to greater and more continous physical and mental exertion than the rider on the mantrip. Even the other occupants of the automobile are not relieved from the obligation to look out for approaching cars, trains and other dangers of the highway. A loose bench in a boarded up truck is not apt to be either safer or more comfortable than a seat in a mantrip. While the operation of the mantrips displays a human absence of perfection, resulting on rare occasions in collisions, mechanical failures, or other such mishaps, the injuries caused thereby are not shown to be greater than, or even as great as, those which attend automobile traffic on the highways. Even the fact that the mantrips are operated "far removed from the beneficial rays of the sun," as the Court states it, is not an unmixed hardship. There are numerous days on the highways when the sun does not shine and when rain or snow or ice, excessively high or low temperatures, cause the traveler to welcome the portal of the mine where he is sheltered from the elements and where the temperature is always uniform (R. 94). The mantrip may suffer a rare derailment or collision, like any other railway, but it is not subject to skidding on wet or icy roads.

3. The Travel On Foot From the Man Station to the Working Place is a Minor Item and is Not as Onerous as the Court Supposed.

The mantrip station is always located in the "section" as near as practicable to the working places of the employees who dismount there, and consequently the walk to the working place ordinarily involves an insignificant part of the travel time. Several witnesses testified to the length of this walk in their

particular cases, and it appears rarely to exceed two or three hundred yards. The Court was misled in supposing that the miners "collect their tools * * * and carry them on foot to the working places" (p. 3). The coal loaders, who constitute the great majority of the underground employees always leave their tools in their working places (R. 101). Many of the "company men" do the same (R. 444, 476). A miner may have to take a tool out for repair on rare occasions, and only in that event does he carry it in or out.

The Court was of the impression that the short walk from the man station to the working places is "through dark and dangerous tunnels" (p. 3). This walk is lighted by the electric lamps which the men carry on their heads and which necessarily provide ample illumination for walking, since they also provide sufficient light for all the processes of underground mining (R. 221).

4. The Supervision to Which the Miners are Subject on the Mantrips is not That of the Petitioner, but of the State.

The Court adopts the thesis that the employees traveling on the mantrips are under orders and are therefore to be deemed as at work. The Court says (p. 3):

> "A company foreman rides on each mantrip and occasionally gives work instructions during the journey. He also compels compliance with numerous safety rules for mantrips **adopted by petitioner** in compliance with state law. Lay-off or discharge may result from a miner's continued failure to obey these rules."

With regard to the foreman giving "work instructions during the journey", the Court overlooked the findings of the Dis-

trict Court and the uncontradicted testimony as to this item, and clearly reached a wholly mistaken impression. The record shows that these "work instructions", first, were given rarely and casually, and, second, did not relate in any wise to any "work" to be performed by the particular employee on the mantrip during the period of the travel. The testimony showed that a foreman, casually riding next to a particular employee on the mantrip and casually thinking of some feature relative to duties to be performed by this employee after his arrival at his working place, might take advantage of this opportunity to mention the matter to the employee. Such occurrences were purely casual and exceptional. The mantrip was not used either in theory or in practice to provide an opportunity for the foreman to give "work instructions" to the men. The uncontradicted testimony on this point is:

> "Q. 227 . Do the section foremen ever give any instructions to the men about the day's work while riding on that mantrip? A. Not necessarily. They tell a man anytime, may tell him at home or in the evening something he might do when he gets to his working place * * * he might tell him anywhere * * * they can't give a man many orders about a working place until they get in the place. Practically all the orders given to a coal loader are given in the working place" (R. 266-7).

One of the witnesses for the respondents gave the following testimony on this point:

> "Q. 8 That's for work for them to do when they get to the place where they are going to work? A. Yes, sir. He will tell you when you are going in on the mantrip what he wants done up in that place * * If he is sitting in the car beside you and he has something he wants you to do, he will tell you * * * Q. 6 If he sees you outside and thinks of something he wants you to do, he will tell you then, too, won't he? A. Yes sir."
> (R. 475-6).

The findings of the District Court clearly were fully supported:

> "Such instances are rare, as instructions are ordinarily and customarily given at the working place. No work or labor is required of the employees while riding on mantrips * *" (53 F. Supp. 939, app. pet. 49).

Is it not plain that this Court cannot logically regard as work the casual and exceptional receiving of such instructions on the mantrips unless it also regards as work the similar receiving of such instructions "at home or in the evening" or on the highway or on any other such casual occasion? This Court would not have mentioned this item unless it had given it weight. The Court must necessarily have been misled by the following statement in the brief for respondents:

> "He (the foreman) sometimes gives work instructions during the ride" (Br. 8).

With regard to the statement of this Court that the foreman "also compels compliance with the numerous safety rules for mantrips adopted by petitioner in compliance with state law," this is surely not a matter as to which the petitioner has any discretion whatever. **The law requires petitioner to discharge this function.**

The Virginia Mining Laws provide (Sec. 1887g):

> "Nothing in this chapter shall be so construed as to relieve the mine owner or operator from seeing that all of the provisions of this chapter are strictly complied with, nor from the duty imposed at common law to secure the reasonable safety of their employees . . . "

It is perfectly plain that the employees, in obeying the safety regulations imposed by law, are complying with the orders, not of petitioner, but of the state. It is also plain from a con-

sideration of the text of the safety regulations relative to the conduct of employees on mantrips (R. 493-4) that they were framed solely for the purpose of securing the safety of the employees in transit and with a single view to their interest.

Similarly the fact that the drivers of the company's vehicles which convey many of the employees from their homes to the mines, comply with the traffic laws and require compliance therewith by their passengers, would require that this travel be included within the workweek.

The Court says (p. 3):

> "Both the mantrip transportation and travel by foot * * occur only as and when required by petitioner * * * Definite schedules are arranged and maintained by petitioner."

The fact that the mantrips run on definite schedules fixed by petitioner does not, we submit, logically support a conclusion that the riders are under petitioner's orders and thereby at work. It is true that the mantrips run on schedules so arranged as to enable each miner to reach his working place at the time when he is required to report for work there. But the same applies to the travel by highway in the company's trucks and buses. The employee must leave his home at such an hour as will enable him to report for work on time. He would not report on time if he missed the mantrip and neither would he get to work on time if he left his home too late to catch the bus. The men who walk in to their working places must start in time similarly. But the fact that petitioner fixes a definite hour for work to start could not thereby characterize as work the time consumed by the employees in advance activities and movements directed to arriving at the place of work at the time therefor. If that were true, all the time of all industrial

employees from the moment of the sounding of the morning alarm clock would be included within the workweek.

Surely on reconsideration the Court will determine that it was misled in its first impression that compliance with the safety regulations and with the schedules of mantrips is a badge of work.

5. The Employees Ride the Mantrips for Purposes and Interests of Their Own, as Well as of Petitioner.

The Court said that:

> ". . . . the underground travel is undertaken necessarily and primarily for the benefit of petitioner . . . . Without such travel the coal could not be mined." (p. 4).

It does not logically follow from the fact that the coal cannot be mined unless the employees arrive at their working places, that the employees have no interest of their own in arriving there and derive no benefit therefrom. It is true that "the extraction of coal from the mines . . . is the prime purpose of petitioner's business," but surely it is equally true that the extraction of the coal is the prime purpose of the business of the employees, and that without such travel they could not engage in that business. They work in the coal mines because they wish to do so, and they earn their livelihood therefrom. The District Court found as a fact that riding the mantrips "constitutes a benefit both to employer and employee" (53 F. Supp. 939, app. pet. 48), from which it follows that an employee is there acting in his own interest as well as in that of petitioner. If this were not true, precisely the same argument would apply to the highway travel of the employees from their homes—"without such travel the coal could not be mined."

6. The Court was Confused or Misled as to the Facts.

We earnestly suggest that the record does not support the facts which the Court has stated as the basis of its conclusion

that the underground travel of the employees to their working places "bears all the indicia of work" (p. 2), and that the Court was confused or misled with reference thereto. As to means, such travel differs only in non-essential particulars from the highway travel which precedes it, and differs not at all as to purpose, which is that the employee may arrive at work on time.

III. The Court Overlooked the Importance of the Distinction Between This Cause and the Tennessee Coal Case with Respect to the Place of Reporting for Work.

In this cause the only requirement of the employees as to where and when they shall report for work is that they be at their working places at the beginning of the shift (R. 96, 97, 100, 113, 218). The District Court so found as a fact—"all plaintiff's employees are required to be at their places of work for the morning shift at 8:00 A. M." (53 F. Supp. 938, app. pet. 46). In the **Tennessee Coal** case the place for reporting was at "the tally house near the mine entrance or portal" (88 L. Ed. adv. ops. 613, app. pet. 134).

The Court says in the present cause that the two practices "differ inconsequentially" (p. 3).

The Court overlooked the fact that in the **Tennessee Coal** case the Court relied upon a line of decisions under the Federal Hours of Service Act of 1907 which held that **when an employee has reported for work,** waiting time **thereafter** is work time. The leading case of the group is **Missouri K. & T. Railway Company v. United States,** 231 U. S. 112, 119, which was followed by this Court in the **Tennessee Coal** case. The employees in question were members of a train crew, whose train had com-

pleted part of its trip and was then involved in a delay. It was there said by Mr. Justice Holmes:

> "One of the delays was while the engine was sent off for water and repairs. In the meantime the men were waiting, doing nothing. It is argued that they were not on duty during this period, and that if it be deducted, they were not kept more than sixteen hours. But they were under orders, liable to be called upon at any moment, and not at liberty to go away. They were none the less on duty when inactive. Their duty was to stand and wait. **United States v. Chicago, M. & P. S. R. Co.** 197 Fed. 624, 628; **United States v. Denver & R. G. R. Co.** 197 Fed. 629."

In this group of cases the question whether or not the particular employees had reported for work was considered decisive. Is not the Court now inconsistent in stating that this question is "inconsequential"?

IV. The Court Has Failed to Consider, Upon the Present Issue, the Opinion of the Persons Best Qualified to Judge.

The Court does not refer in the opinion to the conferences between the Administrator on one hand and the representatives of the Union and of the employers on the other which over a period of months in the year 1940 preceded the Administrator's ruling that the Act does not require the inclusion of this travel in the workweek. We urge most earnestly upon the Court's attention the fact that the leaders of the Union and their legal advisers, together with the representatives of the employers (thus including all the persons who are surely best qualified to know), presented verbally to the Administrator on various occasions, and finally joined in framing and subscribing a written statement to him, that

> ". . . travel time was never considered as part of the agreement or obligation of the employer to pay for in

> this industry, nor as hours worked by the employees, and this has been the case since the 8-hour day was established in the industry—April 1, 1898" (Houck Letter, 53 F. Supp. 952, app. pet. 78).

The Houck Letter is not mentioned by the Court and thus was not accorded weight. But it was the product of a series of conferences between the industry and the Administrator extending over a period of months. The representatives of the Union in these conferences included the president, two successive general counsel, and other leading officials (R. 138-141, 187-8). The representatives of the employers included several of the most prominent and experienced members of that group. From the outset, there was never the slightest difference between any of them upon the present point. They were completely familiar with all the practices and did not find in them those indicia of work by which the Court undertakes to support its decision. Their purpose was to satisfy and convince the Administrator of the correctness and reasonableness of their definition of the workweek, and they did so. The Houck Letter was the act of the entire group and accurately stated the facts and reflected the consensus (R. 142, 187, 190). To all of this, and to the great mass of other evidence in the record showing that all persons in the industry were in agreement that this travel time was not work time (a situation which continued until August 1943), the Court has given no consideration. We urge that it ought to be considered, and accorded compelling weight.

Surely it is obvious that upon such a question of fact as this, the unaminous belief of the most experienced and clear-headed persons, in the industry, both employees and employers, is entitled to some consideration. Surely the concept, "work", in the coal mining industry cannot be so abstruce and so transcendental that it cannot be grasped by such persons engaged

in that industry and having a life-long experience therein. Surely there is nothing to show that it was the congressional intention in the Act that this word should be understood and applied by the courts in a different sense from that in which it is understood and used by the persons engaged in the industry. Surely when these persons tell the Court, with a unanimous voice, that the underground travel is not work, that should settle the question for present purposes. How can the Court be justified in ignoring such a record?

V. The Practice as to Payment For Travel Time in Foreign Countries is Inconclusive Here.

The Court says that

> "the wide-spread practice in coal producing nations . . . . further bears out the conclusion that underground travel is work" (footnote p. 7).

We suggest to the Court that this inference is not entitled to weight. The record presents nothing approaching a study of the practice in foreign countries in this respect, nor of the general practices and conditions of coal mining there (R. 327). It is just as likely that the major foreign practice is contra. But however that may be, it is surely inadmissible to argue that foreign opinion on the point, based upon conditions of work and bases of pay obtaining in foreign mines, is superior to that of the persons best qualified to judge here at home based upon home conditions. Certainly it cannot be said that travel time is paid for in foreign countries by virtue of any statute similar to our Act or any authoritative interpretation that such travel time is work time. In this country, too, agreement has been reached through collective bargaining to pay for travel time, but neither such voluntary agreement nor any similar practice in foreign countries is relevant to judicial interpretation of the Act.

VI. The Court Failed to Consider the Legislative History of Congressional Efforts to Stabilize Competitive Conditions in the Industry.

The present decision undoes the labors of Congress (1st and 2nd Bituminous Coal Acts) and of this Court (Appalachian Coals vs. United States, 288 U.S. 344) to stabilize normal competitive conditons in the industry. There is nothing whatever in the legislative history of the Act supporting an inference that Congress intended the Act to conflict with the purposes of the Bituminous Coal Act of 1937 (50 Stat. 72, 15 U.S.C.A., Sec. 828ff.) In the absence of ground for such an inference, ought not the Act to be construed harmoniously with the Coal Act? The two enactments were almost contemporaneous.

This Court, in the **Tennessee Coal Case**, stressed the "remedial and humanitarian" purposes of the Act. The Court has the word of the employees and the employers alike that under normal competitive conditions (which will inevitably return at the end of the war) the effect of the present decision

> "would create so much confusion in the bituminous industry as to result in complete chaos and would probably result in a complete stoppage of work at practically all of the coal mines in the United States" (Houck Letter 53 F. Supp. 952, app. pet. 78).

Such a result is surely not "remedial and humanitarian." In the **Tennessee Coal Case** this Court made a remedial decision based in considerable part on the redress of impositions upon a weak and ineffectual Union. Here there is shown no imposition, no wrong in the eyes of the Union and no occasion to assist the bargaining agent in realizing for its members all benefits provided by the Act. In this case there are absent those "humanitarian" considerations which so largely moved

the Court to its conclusion in the **Tennessee Coal Case**, and yet the Court applies that decision and the definition it there formulated to this case nowithstanding the lack of factual support in this record for grounds emphasized by the Court as prominent among its reasons for arriving at the earlier decision. It is submitted that while employees should not be penalized for having a strong bargaining agent, a realistic view of the case compels the conclusion that practical men know when they are "at work." And a strong Union stands to lose more by curtailed scope of the bargaining area than it can gain by an artificial definition claimed for a temporary advantage.

The Court says that by reason of the present decision, "thus shall each of petitioner's miners receive his own reward according to his own labor" (p. 7). But this effect does not logically follow in view of the basis of stabilization of the industry over a long period of history through uniform wage rates and area freight rates. This equalized, for example, the earnings opportunity of the coal loaders, "so that in the exercise of the day's work they would get the same yield of production as the miner in the next mine from them" (R. 147-8). Under the present decision the coal loaders lose their previous equality of earnings opportunity.

> "A man working in a place near the driftmouth where he would have very little travel time would be loading coal and have some advantage over the man who has to ride a long way and would only get to work probably seven hours a day, while the man at the place that is close might get to work eight hours a day" (R. 242).

The fact cannot be ignored that the majority element, the key men in the production of coal, are piece-workers whose earnings vary directly with their hours of work at the

face of the coal. Payment for these miners on the piece-work basis has immemorially been acceptable to them as evidenced by the long succession of collective bargaining agreements. There is nothing in the Act, or in its legislative history, to indicate that it was the Congressional intention, to remove this basis from the field of collective bargaining and to strike down as unfair the piece-work system so long obtaining. Unless such was the Congressional intention, it is difficult to see how an effort by this Court to alter an essential practice in the industry, by forcing it into the mold of an artificial definition absent alike from the Act and from the long succession of collective bargaining agreements, can be other than a great disservice to these employees.

And aside from the piece-workers, under this decision the "company man" who rides the mantrip without duty or responsibility, receives precisely the same pay as the motorman and brakeman who operate the equipment in which he rides. Surely one or the other of these is not "receiving his own reward according to his own labor."

VII. The Decision Contains Elements of Essential Injustice Which the Court Has Not Considered.

The Court's opinion does not deal with the Union's reversal of position and the consequent unconscionable effects visited upon petitioner by the decision. We urge the Court to consider that petitioner entered into the various collective bargaining agreements with the Union in good faith and in reliance upon the position which the Union had consistently held from the time when the Act was first introduced in Congress in 1936, and had publicly maintained in the Houck Letter. It cannot for a moment possibly be doubted or questioned on this record that the Union's reversal and repudiation of that position was

made, not because of any change of its conviction upon the point in issue, but purely for its financial profit. To permit the Union to succeed in such circumstances is to violate the basic principle of justice that "no man shall profit by his own wrong." And "this maxim is far more than a mere banality", as was recently said by Mr. Justice Murphy speaking for this Court of a related fundamental, **Precision Instrument Manufacturing Company vs. Automotive Maintenance Machinery Company**, No. 377, decided April 23, 1945.

If the Union's present position had been taken at the time the contracts here involved were negotiated, petitioner could, and doubtless would, have protected itself against the large accrued liability with which it is now burdened by the decision. For example, the agreement of April 1, 1941, expiring March 30, 1943, provided a 25% wage increase on the face-to-face basis (Ex. 10, R. 51, 294), within which there was ample latitude for protection against the present demands. This agreement was extended by agreement of the parties to May 1, 1943 (Ex. 30, R. 299, 709), was further extended to May 31 (Ex. 34 A. R. 303, 717-8)—"we are requesting our membership to continue at work **under the existing retroactive extended agreement** until midnight May 31." The agreement was then further extended to June 20 (R. 304).

The Union has stated in its brief that it disclaims its rights to pecuniary recovery under the Act except "for the 8 pay periods from April 1 to June 20, 1943" (Br. 14), and this Court has perhaps restricted the recovery accordingly (p. 1). But the figure is still very large. The record affords no support for the June 20th terminal. No reason appears why that time was indicated instead of, for instance, May 1, 1943, when the United States first seized the mines (R. 301, 713). Both dates

were within the agreed extension of the applicable wage contract.

It is wholly unfair and inequitable to permit the Union thus to repudiate the extension of its contract from April 1, to June 20, 1943, and to reap a reward for so doing in the circumstances of this case. Petitioner has complied strictly with its contract, while the Union has repudiated it in the most brazen and cynical manner. Yet the effect of the decision is to reward the wrong-doer at the expense of the innocent. Surely it cannot be successfully claimed that the Union is free of moral wrong, that it has not been guilty of sharp practice, that it has not lost its right to make any pecuniary claims.

VIII. Conclusion.

In view of the strong considerations supporting the prayer of this petition and hereinbefore pointed out, we respectfully submit that rehearing ought to be granted.

Respectfully submitted,

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